LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAY 19 1949
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1949

No. ~~982~~ 76

TRAVELERS HEALTH ASSOCIATION AND R. E. PRATT, AS TREASURER THEREOF, AND IN HIS PERSONAL CAPACITY,

Appellants.

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,

Appellee.

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

J. LINDSAY ALMOND, JR.,
Attorney General of Virginia,
Counsel for Appellee.

INDEX

Subject Index

	Page
Statement of Appellee Opposing Jurisdiction and Motion to Dismiss or Affirm	1
I. State Statute Involved and the Nature of the Case	2
A. The Statute	2
B. The Facts	4
C. The Proceedings Below	6
The Question Presented	7
II. Argument:	
A. The Commonwealth of Virginia May Regulate the Promotion of the Sale of Securities by Non-residents or Residents Alike, Whether the Same be Carried on by the Use of the Mails or Not	8
B. Notice of the Proceedings Under Section 6 of the Virginia Securities Law Sent by Registered Mail and Actually Received Was Sufficient Upon Which to Base the Cease and Desist Order Against the Appellants	10
Conclusion	14

Table of Cases Cited

Caldwell v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559	8
Hall v. *Geiger*, 242 U. S. 539	8
Hess v. *Pawloski*, 274 U. S. 352	11
In re Pallister, 136 U. S. 257	10
International Shoe Co. v. *State of Washington*, 326 U. S. 310	11
Merrick v. *N. W. Halsey & Co.*, 242 U. S. 568	8
Storey v. *United Insurance Co.*, 64 Fed. Supp. 896	11
U. S. v. *Steinberg*, 62 F. 2d 77, Cert. Den. 289 U. S. 729	10

Page

Wilentz v. *Edwards*, 134 N. J. Eq. 522 11
Wuchter v. *Pizzutti*, 276 U. S. 13 11

STATUTES CITED

Acts of General Assembly of Virginia, 1928, Chap. 529 2
Acts of General Assembly of Virginia, 1932, Chap. 236 3
U. S. Code Anno., Title 15, Sec. 77-r 9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 802

TRAVELERS HEALTH ASSOCIATION AND R. E. PRATT, AS TREASURER THEREOF, AND IN HIS PERSONAL CAPACITY,

Appellants.

v.

COMMONWEALTH OF VIRGINIA, AT THE RELATION OF THE STATE CORPORATION COMMISSION,

Appellee.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions raised by this appeal, files this statement in opposition to Appellants' statement as to jurisdiction. Appellee includes

herein its motion to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of Virginia on the ground that the questions raised on behalf of the Appellants are so unsubstantial as not to need further argument. The matters here relied upon are more particularly stated below.

I

State Statute Involved and the Nature of the Case

A

The Statute

This appeal raises the question of the validity of certain provisions of the Virginia Securities Law or what is generally known as the Virginia Blue Sky Law, (Acts of the General Assembly of Virginia, 1928, Chapter 529, page 1373, and Acts amendatory thereof; Sections 3848 (47) to 3848 (66) inclusive of Michie's 1942 Code of Virginia). This statute requires every person, association or corporation desiring to engage in Virginia in the selling, promotion or offering for sale securities covered by the statute, to apply for a permit so to do. Certain conditions must be complied with before a permit is issued; the applicant is required to provide detailed information with reference to the securities and the solvency of the issuer of the securities and other matters relating to the propriety of their sale; and the State Corporation Commission of Virginia is authorized to conduct such investigation as it may deem appropriate and to see to the proper application of the proceeds from the sale of the securities. In general, the statute contains provisions similar to those usually contained in the "Blue Sky" laws of the various States. The Appellants do not deny that their membership contracts constitute "securities" within the meaning of the law, nor

do they claim to have applied for or secured the required permit to sell or offer them for sale in Virginia.

Section 15 of the Act (Michie's Code, Section 3848(61)) provides that any person violating the Act, or who shall fraudulently evade or attempt to evade the provisions thereof, shall be guilty of a misdemeanor, where not otherwise provided, and punished by a fine or confinement in jail, or both. Proceedings to enforce the penalties provided by this section for such violations must be instituted by indictment or information in the appropriate courts of record of the State.

Section 6 of the Act, as amended by Chapter 236 of the Acts of Assembly of Virginia of 1932, (Michie's Code, Section 3848(52)) authorizes the State Corporation Commission, upon its own motion, or upon complaint of any resident of the State of any violation of the Act, to issue a cease and desist order in the nature of a temporary and/or permanent injunction and restraining order against further violations, after at least ten days notice, by registered mail to persons, corporations or associations upon whom personal service can not be had because of absence from the State. Signed receipt of the registered notice is required to be returned by the postal authorities. It is this Section 6 of the Act, which is set out as Appendix A of the Appellants' Statement As To Jurisdiction, under which the proceedings here involved were brought, and it is this particular provision of the Virginia Securities Law which the Appellants contend is invalid.

Section 17 of the Act authorizes the Commission to impose a fine not exceeding five hundred dollars for failure or refusal to comply with any lawful order made under the Act.

B

The Facts

The Travelers Health Association is a non-profit membership association incorporated under the laws of Nebraska, with its home office in Omaha. Letters and other exhibits filed in the case show that the Appellant, R. E. Pratt, a resident of Omaha, is the Treasurer of said association and conducts its correspondence soliciting new membership contracts, which contracts provide health insurance protection. The association has not now, nor has it ever had, any office, officer, or agent, or any bank account or property located in Virginia. At the time of the hearing of this case it had in force in Virginia approximately eight hundred membership certificates, which provided health insurance protection in the form of sickness benefit payments. The association has caused many claims asserted by its Virginia members to be investigated in Virginia. (The Appellants question the finding of the Supreme Court of Appeals of Virginia that such investigations took place in Virginia, but, if investigations of claims on Virginia risks took place, as was admitted in the stipulation, it is difficult to imagine where such investigations would take place other than in Virginia.)

The customary method of soliciting new members has been for the Virginia members of the association to recommend to it persons who they believe to be likely prospects. The association then writes to these persons inviting them to make applications for membership. All such letters are transmitted by mail from the United States Post Office in Omaha and delivered by mail to the prospects in Virginia. If upon the receipt of this letter the applicant is so disposed, he fills out the application blank and sends it by mail to the home office of the association in Omaha, where it is received and acted upon.

The exhibits contained in the record include a letter from the Appellant Pratt, as Treasurer of the Association, addressed to a prospective member. The letter was accompanied by an application form containing twenty-six questions to be answered by the applicant, who is instructed after he has signed it to forward it "with membership fee to R. E. Pratt, Treasurer," Omaha, Nebraska. The application form contemplates reference to an existing member of the association for recommendation of the applicant for membership. There appears on the application the following:

> "Money Back Guarantee
> "Our policies are issued subject to approval of the applicant. If not satisfactory they may be returned within ten days from date of issuance and all money paid thereon will be refunded promptly."

In addition, there was also enclosed with the letter of solicitation a separate, printed "Absolute Guarantee" slip containing a provision in conformity with the one quoted above. On the face of this slip appears the following:

> "Note—It is not necessary to show the name of anyone as recommending you, as you have already been recommended to us by one of our members."

On the reverse side of said guarantee slip appears a printed copy of a letter from one of the members of the association residing at Baltimore, Maryland. In this letter the member expresses thanks for the promptness with which the association has paid benefits on account of his recent illness and concludes with this statement: "I am working on several of my friends to get them to join and expect to send you several applications real soon."

The Supreme Court of Appeals of Virginia held that the mailing of a copy of the letter received by the association from its Baltimore member stating that he was working on several friends and expected to send in their applications

constituted an implied invitation to its member not only to send in the names of persons recommended for membership, but also to solicit and send in completed applications for membership. The Court further held that, while old members have not been technically designated as agents of the association or employed to solicit for it, its encouragement of that activity and the acceptance of the fruits thereof by taking the same without question, and relieving the prospective member of the requirement of furnishing a reference, constituted a ratification of the efforts of the old members and rendered the association responsible therefor. The Court also held that the forwarding of the membership certificate to the Virginia applicant, subject to his approval, rendered it merely an offer on the part of the association and that it was the approval of the provisions of the certificate and the acceptance thereof in Virginia by the prospective member which consummated the contract.

The above statement of the facts is based upon the opinion of the Court below copied in Appendix B of the Appellants' Statement As To Jurisdiction, the Stipulation of Facts found at pages 6-7 of said Statement, and the exhibits filed with the record.

C

THE PROCEEDINGS BELOW

Pursuant to Section 6 of the Virginia Securities Act, proceedings were instituted against the Appellants by the State Corporation Commission of Virginia on May 5, 1947, in which the Appellants were charged with advertising, offering for sale and promoting the sale of the securities in question in Virginia without having procured the necessary permit or authorization and in contravention of the provisions of the Virginia Securities Act. Notices of the proceedings were sent to the Appellants by registered mail,

and the Post Office receipts, filed as exhibits, showed delivery of the same. The notice informed the Appellants that at the time indicated they would be given an opportunity to be heard upon whether a cease and desist order should be entered against them.

The Appellants appeared specially by counsel and objected to the jurisdiction of the Commonwealth of Virginia and the State Corporation Commission, basing their objections on the grounds asserted in this appeal. After the hearing the Commission entered the order complained of. The order recited the finding of the Commission that the Appellants had been engaged in the business of soliciting membership certificates in Virginia and in advertising, promoting, offering for sale, and in selling securities in Virginia without complying with the Virginia Securities Act. The order enjoined the Appellants from continuing such activities unless and until they complied with that statutory enactment. The Supreme Court of Appeals of Virginia affirmed this judgment.

The Question Presented

The only question presented by this appeal is whether the Commonwealth of Virginia may, after actual notice to the parties sent by registered mail and an opportunity for a hearing, order non-residents doing business in the manner and by the means adopted by the Appellants to cease promoting, advertising, offering for sale, and selling securities in Virginia unless and until they comply with the Virginia Securities Act by securing a permit or authorization from the State Corporation Commission in accordance with law. Stated differently, does an order, based upon such notice and hearing, directing the Appellants to cease violating the law of the Commonwealth of Virginia constitute due process of law.

II

ARGUMENT

A

The Commonwealth of Virginia May Regulate the Promotion of the Sale of Securities by Non-residents or Residents Alike, Whether the Same Be Carried on by the Use of the Mails or Not.

It is settled beyond controversy that the regulation of the promotion and sale of securities is a proper exercise of the police power of the States. *Hall v. Geiger*, 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559, 37 S. Ct. 224, 61 L. Ed. 493; and *Merrick* v. *N. W. Halsey & Company*, 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498.

The promotion of the sale of securities within Virginia, their advertisement in this State, offers for their sale made here and their actual sale here are very much the concern of the Commonwealth and the regulation of those engaged in such activities is a matter clearly within the police power of the State. The regulation of such activities is even more important when they are conducted by non-residents because of the difficulties which citizens of this State would have in securing redress from such non-residents in cases of fraud.

A person may throw a stone, shoot a gun, or send libelous material through the mails, across State borders. Likewise he may send advertising, promotional material and offers for the sale of securities across State borders. Just as the receiving State may take action to prevent the more violent actions first mentioned, it can provide for the regulation of activities by non-residents who promote, within its borders, the sale of securities. The latter, if not subject to regulation, can be even more vicious than the former.

That a State may regulate the promotion of the sale of securities within its borders when such activities are carried on by non-residents through the mails was clearly recognized in *Merrick* v. *N. W. Halsey & Company, supra.* In that case a partnership composed of residents of New York and New Jersey attacked the Michigan Blue Sky Law. They had no offices in Michigan, had no salesmen there, but merely solicited orders for the purchase of securities by means of the mails. They wished to continue making further offers in the State without complying with the statute. The District Court of the United States for the Eastern District of Michigan enjoined the enforcement of the statute. Upon appeal the Supreme Court reversed the District Court and sustained the power of the State of Michigan to regulate their sales of securities through the mails.

That the regulation by a State of the promotion of the sale of securities when carried on through the United States mails does not interfere with the power of Congress to establish post offices and post roads and to regulate the use of the mails is clearly shown by the fact that Congress, in enacting legislation regulating the sale of securities by means of the use of the mails, expressly provided as follows:

> "Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) of any State or Territory of the United States, or the District of Columbia, over any security or any person." Title I, Section 18, of the Securities Act of 1933 (Title 15, Section 77-r of United States Code, Annotated).

It was clearly the intention of Congress to leave the States free to exercise such regulatory control over the sale of securities as does not conflict with the provisions of the Federal Act, and in the absence of such conflict, it is contemplated that the States and the Federal Government shall exercise concurrent jurisdiction. If the use of the mails by

the Appellants results in a violation of the laws of Virginia regulating the sale or promotion of securities, the acts of the Appellants become subject to appropriate action by Virginia. *In re Pallister*, 136 U. S. 257, 10 S. Ct. 1034, 34 L. Ed. 514; *United States* v. *Steinberg*, 62 F. (2d) 77, Cert. Den. 289 U. S. 729, 53 S. Ct. 526, 77 L. Ed. 1478

B

Notice of the Proceedings under Section 6 of the Virginia Securities Law Sent by Registered Mail and Actually Received Was Sufficient upon Which to Base the Cease and Desist Order Against the Appellants.

Since the activities of the Appellants in Virginia, though carried on largely through the mails, are properly subject to regulation by Virginia, an order directing them to cease their activities unless and until they have complied with the laws of Virginia, issued after notice sent by registered letter and actually received by them and after they have been given an opportunity to be heard in no way fails to afford the Appellants due process of law.

The proceedings here do not involve the rendition of a pecuniary civil judgment against the Appellants and the order entered has no such effect. The proceedings were instituted by the Commonwealth to determine whether the activities of the Appellants did in fact constitute a violation of the Virginia Securities Act and, when this fact was established, the order entered against the Appellants simply directed them to cease their activities until they complied with the Virginia law.

The Appellants carry on activities in Virginia which affect Virginia citizens. Not only are these activities carried on through the mails, but they are supplemented by other activities in Virginia described by the Court below, that is, the encouragement of Virginia members to solicit applications

from other prospects and the acceptance of their efforts in this respect; the contracts are consummated in Virginia by the acceptance on the part of the applicant; the investigation of claims on Virginia risks; and the performance of the contracts in Virginia by the payment of such claims.

Service of process upon non-residents of a State by registered mail in appropriate cases is a well established practice. *Hess* v. *Pawloski*, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091; *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446; *Storey* v. *United Insurance Co.*, 64 F. Supp. 896 (D. C. East Dist. of S. C.) and in a case arising under the Blue Sky Law of New Jersey, *Wilentz* v. *Edwards*, 134 N. J. Eq. 522, 36 Atl. (2d) 423.

In *International Shoe Company* v. *State of Washington*, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, the Supreme Court sustained the jurisdiction of the Washington State Courts to entertain an action for the recovery of unemployment compensation taxes arising out of salaries paid the agents of the company for their services in soliciting orders in the State, although the solicitors had no authority to bind the company or to accept service of process, their authority being strictly limited to taking orders and submitting them to the home office of the company in St. Louis, Missouri. In that case Mr. Chief Justice Stone said:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer *v.* Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it

suelf that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' • • •

"Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact; Klein *v.* Tax Supers. 282 U. S. 19, 24, 75 L. ed. 140, 143, 51 S. Ct. 15, 13 ALR 679, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem sufficient to satisfy the demands of due process. L. Hand, Circuit Judge, in Hutchinson *v.* Chase & Gilbert (CCA2d) 45 F 2d 139, 141. *Those demands may be met by such contacts of the corporation with the state of the forum* as make it reasonable, in the context of our federal system of government, to require the corporation to defend the *particular suit which is brought there.* An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection. Hutchinson *v.* Chase & Gilbert, supra (45 F 2d 141).

"'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. • • •

• • • • • • •

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that

state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

* * * * * * *

"Applying these standards, the activities carried on in behalf of appellant in the State of Washington were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an unreasonable or undue procedure.

"We are likewise unable to conclude that the service of the process within the state upon an agent whose activities establish appellant's 'presence' there was not sufficient notice of the suit, or that the suit was so unrelated to those activities as to make the agent an inappropriate vehicle for communicating the notice. *It is enough that appellant has established with contacts within the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual.* * * * *Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit.* * * *"
(326 U. S. 310, 316-318)

In the present case it was the "activities" of the Appellants in Virginia which gave rise to this particular suit. The method of substituted service was certainly calculated to apprise the Appellants of the suit since it resulted in actual notice to them. It is certainly consonant with traditional notions of fair play and substantial justice to require the Appellants to answer in Virginia an action to direct them to comply with Virginia statutes if they wish to continue their activities in Virginia.

Conclusion

Wherefore, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Appeals of Virginia.

J. Lindsay Almond, Jr.,
Attorney General of Virginia,
Counsel for Appellee.

(2546)